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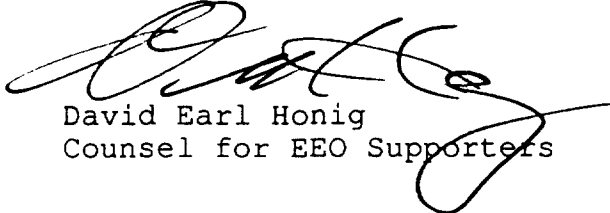
Hon. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Dear Ms. Salas:

RE: MM Dockets 98-204 and 96-16
(Broadcast and Cable EEO)

On behalf of MMTC et al. ("EEO Supporters"),
transmitted herewith are ten copies of Volume I
of our Comments, entitled "The Basis for FCC EEO
Regulation." Consideration of these Comments
nunc pro tunc is respectfully requested for the
reasons set out in my letter filed March 1, 1999.
We will shortly file Volume II ("The Operation of
an FCC Regulatory Program"), Volume III
("Statements of Witnesses") and Volume IV
("Discussion of Witnesses' Statements").

Respectfully submitted,


David Earl Honig
Counsel for EEO Supporters

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Before the
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Washington, D.C. 20554

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MAR - 5 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Review of the Commission's)
Broadcast and Cable Equal) MM Docket No. 98-204
Employment Opportunity Rules and)
Policies)
and)
Termination of the EEO) MM Docket No. 96-16
Streamlining Proceeding)

TO THE COMMISSION

COMMENTS OF EEO SUPPORTERS

VOLUME I:

THE BASIS FOR FCC EEO REGULATION

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[cover page, continued]

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National Association of Black
Telecommunications
Professionals
National Association for the
Advancement of Colored People
National Association of Black
Journalists
National Bar Association
National Council of La Raza
National Hispanic Media Coalition,
including its Los Angeles, New
York, Chicago, Tucson,
Albuquerque, Phoenix and San
Antonio Chapters
National Latino Telecommunications
Taskforce
National Urban League
People for the American Way
Project on Media Ownership
Puerto Rican Legal Defense and
Education Fund
Rainbow/PUSH Coalition
Telecommunications Advocacy
Project
Telecommunications Research and
Action Center
Women's Institute for Freedom of
the Press

March 5, 1999

DEDICATION

These Comments are dedicated with the greatest love and admiration to Clifford J. Durr and Virginia Foster Durr. The Durrs were extraordinarily courageous civil rights pioneers whose work initiated the struggle for democracy in the mass media. We honor their memory and consider it a privilege to carry on their work.

March 2, 1999 was the 100th anniversary of Clifford Durr's birth. Virginia Durr, his wife of 50 years, almost lived to celebrate the occasion. She passed away February 24, 1999 in Carlisle, PA at the age of 95. Clifford Durr passed away in 1977.

Virginia Durr rose to fame in 1954, when she bailed Rosa Parks out of jail. Mrs. Parks had been arrested for refusing to sit in the back of the bus -- an incident that triggered the modern civil rights movement.

In 1944, Clifford Durr was the first FCC commissioner to oppose segregation in broadcasting. Appointed to the FCC by President Roosevelt in 1941, Commissioner Durr wrote the Blue Book, which first expressed the concept that broadcasters must serve all Americans. Commissioner Durr was responsible for the noncommercial FM band (88.1-91.9 MHz) and many consider him the father of FM radio. He served until June, 1948, having declined reappointment because he could not in good conscience administer the Cold War "loyalty" program.

In 1951, Clifford and Virginia Durr opened the only law office in Montgomery, Alabama that represented Black civil rights workers. Lyndon Johnson was one of many who recognized the Durrs as civil rights mentors.

Clifford Durr's fight to end segregation in broadcasting culminated in the FCC's 1969 rules that opened broadcast employment to minorities and women.

This proceeding is about achieving a fully diversified broadcasting industry -- Clifford and Virginia Durr's dream of 55 years ago. Surely they are smiling at the FCC from Heaven today.

* * * * *

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**Summary of Contents of Volume II (forthcoming):
The Operation Of An FCC EEO Regulatory Program**

IV.	Is EEO Compliance "Burdensome"?
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IX.	Should The Commission Establish A Task Force On Equal Opportunity?
X.	Conclusion

**Volume III (Statement of Witnesses) and Volume IV
(Discussion of Witnesses' Statements) are also forthcoming**

* * * * *

SUMMARY

The organizations signing onto these Comments comprise one of the largest, most diverse communities of interest ever to participate in an FCC proceeding.

We have often been critical of the FCC's resolve in this fundamental area of broadcast regulation. Thus, we are privileged to say that we consider the proposals in this NPRM^{1/} to be well intentioned, well thought out, and eminently fair and reasonable. Although the FCC has too often spoken with less than optimal clarity, consistency and resolve on equal opportunity, this time the FCC has it right.

Our Comments underscore why the broadcast industry will be more competitive, and why broadcast consumers will be well served by aggressive EEO enforcement which gives wide latitude to law-abiding broadcasters while conceding no quarter to lawbreakers.^{2/} We urge the Commission to adopt a Zero Tolerance Policy for discrimination,^{3/} and we set out how that policy can be put into practice.^{4/}

We explain why a program of targeted recruitment is constitutionally acceptable and wise,^{5/} and why the FCC's role in EEO enforcement is justified to prevent discrimination, remedy past

1/ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, 13 FCC Rcd 23004 (1998) ("NPRM").

2/ See pp. 31-43 infra.

3/ See Volume II infra.

4/ See Volume II infra.

5/ See pp. 55-86 infra.

discrimination, promote diversity of viewpoints within stations and through minority ownership of stations, and offer the public a means of access to the stream of communications and information.^{6/}

We demonstrate that EEO compliance is not burdensome to broadcasters, although the absence of EEO enforcement would be enormously burdensome to viewers and listeners, minority and female job applicants and employees, educational and civic institutions, and EEO compliers, including minority and female broadcasters.^{7/}

We demonstrate that stations with fewer than ten employees are typically the initial points of entry for women and minorities, and therefore should be among the least likely candidates for EEO immunization.^{8/} We demonstrate that outreach-based EEO enforcement has been effective and fair,^{9/} and we illustrate how the FCC can best monitor and enforce an outreach-based program after the unfortunate decision in Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir.), rehearing denied, 154 F.3d 487 (1998) ("Lutheran Church").^{10/} We suggest appropriate remedies for EEO violations.^{11/}

6/ See pp. 87-174 infra.

7/ See Volume II infra.

8/ See Volume II infra.

9/ See Volume II infra.

10/ See Volume II infra.

11/ See Volume II infra.

Finally, we advocate the creation of a Task Force on Equal Opportunity.^{12/} Such a Task Force could address the many practical issues unlikely to be fully resolved by this proceeding, and it could develop new initiatives to further improve and modernize the FCC's civil rights enforcement programs.

We have invested the time and effort required to submit a comprehensive set of proposals because of the importance, breadth, and subtleties of the issue before us. EEO demands no less care and thoroughness of analysis than health care, airline safety, immigration, water, air and food quality -- and telephone and cable rates.

Discrimination is an intricately interwoven thread within the fabric of our society. It has been with us for 400 years. Eliminating it will take work, commitment and courage. The NPRM manifests all of these things, reflecting the best of what government should be about.^{13/}

* * * * *

^{12/} See Volume II infra.

^{13/} The views expressed in these Comments are the institutional views of the organizational commenters, and do not necessarily reflect the individual views of any commenter's officers, directors or members.

INTRODUCTION

EEO compliance is essentially the only public service the Commission requests of radio stations, and one of very few public services required of television stations, cable systems and other mass media outlets, in exchange for the free and protected use of valuable radiofrequency spectrum.^{14/}

That is why it is essential that the Commission create new EEO regulations which the industry will respect. The new regulations must not be perceived as so innocuous that no one could ever be sanctioned for violating it. Nor should it be so hair-splitting as to produce illogical or unjust results.

The new EEO regulations should be a nondiscrimination-promoting and discrimination-avoidance program, disallowing the use of race and gender in hiring decisions while ensuring that qualified minorities and women can learn of job openings. They should contain carefully crafted, race- and gender-neutral procedures which will prevent both intentional and unintentional discrimination.

Equal opportunity should be sacrosanct in the law of broadcasting. The full inclusion of minorities and women in the mass media has been essential to intergroup understanding and communication, to the diversity and strength of our national culture, and to the vitality of our democracy. This inclusiveness has largely been made possible by FCC equal employment opportunity regulation. By seeking to curtail the tradition of exclusionary word-of-mouth recruitment so common in close-knit industries like

^{14/} For convenience, we refer to "broadcasters" throughout these Comments. These references are intended to refer to all regulated mass media industries.

broadcasting, the FCC's civil rights policies have ensured that the mass media industries are held to the highest standards of enlightened business in providing equal opportunity.

Over the past thirty years, many broadcasters reached an epiphany on the subject of equal employment opportunity. They came to recognize that diversity invigorates and strengthens the industry. Many wonder why they ever doubted the value of EEO requirements. That is why it is now possible to contemplate and achieve the elimination of discrimination and its present effects, root and branch, from the broadcasting industry. But until all vestiges of a two-class system of employment have been eliminated from broadcasting, strong and comprehensive EEO enforcement is an absolute necessity -- without qualification, equivocation, opting out, waiving out or exempting out. Providing equal employment opportunity, and taking aggressive steps to remedy the consequences of decades of unequal opportunity, should be considered an honor for all broadcasters.

Since FCC EEO oversight began in 1969, we have come roughly halfway toward full equal opportunity. According to the FCC's annual EEO Trend Reports (1971-1997), in 1971, when data was first collected, minorities were 9.1% of all broadcast employees and 6.8% of top four category broadcast employees; women were 23.2% of all broadcast employees and 6.9% of top four category broadcast employees. By 1997, when data was last collected, minorities were 20.2% of all broadcast employees and 18.1% of top four category broadcast employees; women were 41.0% of all broadcast employees and 34.9% of top four category broadcast employees. Id.; see also Table 1, p. 46 infra. University of Missouri Professor of

Journalism Emeritus Vernon Stone has estimated that in the late 1960's, before the EEO Rule, minority representation in broadcast newsrooms was less than 2%. By 1972, it was 12%; it reached 14% by 1982 and 18% by 1990.^{15/} While this is still far behind the 24% representation of minorities and the 46% representation of women in the national workforce,^{16/} it represents substantial progress.

No one doubts that this progress would have been possible if the FCC had not been enforcing an EEO rule -- even those who doubt the wisdom of particular elements of the FCC's original rule.

Finishing the job will require uncommon willpower and leadership because the nature of discrimination has changed. Although bad actors and ill will still abound, open and notorious discrimination has been replaced with a malignant and evasive variety. The historical record shows that the Commission can no longer cherry-pick enforcement cases based on licensees' admissions of discrimination or their inept and clumsy attempts to conceal it.

When the EEO Rule was first adopted, the Commission's goal could not have been more clearly articulated: "achieving equal employment opportunity at the earliest possible time."

Nondiscrimination in Broadcasting, 18 FCC2d 240, 245 (1969)

(emphasis added) ("Nondiscrimination - 1969").

In order to achieve that goal, the Commission did not acquiesce to nonminority broadcasters' self-interested complaints that providing a fair chance for minorities and women to participate

^{15/} B. Lamber, "Black and White TV: Minorities Scarce on Newscasts", Saint Paul Pioneer Press, June 23, 1996, at 1A ("Lamber").

^{16/} Bureau of Labor Statistics, Division of Labor Force Statistics (1998).

in the broadcast workplace would "burden" them. Instead, when it proposed the original EEO Rule, the Commission proclaimed with simple eloquence that "[t]he thrust of our message is that the Nation requires a maximum effort in this vital undertaking and [we] call upon all broadcasters to make as great a contribution as they can." Nondiscrimination in Broadcasting, 13 FCC2d 766, 775 (1968) ("Nondiscrimination - 1968").

The NPRM revives that "can do" spirit. Our goal, in these Comments, is to illustrate (1) why we need strong EEO enforcement now more than ever; (2) how EEO regulations can be crafted and enforced fairly; and -- by encouraging broadcasters to do more than the bare minimum necessary to comply with the regulations -- (3) how the Commission can ultimately preside over the end of workforce segregation and moot any further need for regulation in this area.

**A. Why we need a well-enforced
EEO Rule more than ever**

**1. Industry experience and technological
advances make EEO virtually cost-free**

This year marks the 30th anniversary of the FCC's EEO Rule. Thus, the FCC is not writing on an empty slate. Broadcasters have had years of "familiarity with our long-standing EEO Rule." Sage Broadcasting Corp., 10 FCC Rcd 4429, 4432 ¶20 (1995). They should not find the new regulations to be foreign to their experience.

Technological advances remove all credibility from the insulting argument that civil rights compliance -- virtually the only thing required of broadcasters in exchange for eight years of protected spectrum access -- is but an onerous "burden." See Volume II infra.

Technology has also reduced greatly the cost and time required for EEO compliance. Sending job notices to fifty sources whenever a job is open requires ten seconds of work -- an e-mail posting or fax polling. The marginal cost of adding minority or female sources is zero. Maintaining job applications and applicant files is equally simple: they can be scanned, catalogued by applicant and job characteristics, and stored on hard disk in a fraction of the time it once took to copy and file them in a drawer. Once on hard disk, the data takes up up no physical space and is almost impervious to destruction or loss. The time required for retrieving and cataloguing this information is minimal.

"Paperless office" software is available off the shelf at any computer supply store, or it can be bought over the Internet.^{17/} This technology is already in general use by the sales departments of most broadcast stations.

**2. Industry conditions threaten
minority and female entry into
and participation in broadcasting**

Consolidation and computerization in the broadcasting industry has tightened the job market, to the greater detriment of minorities and women.

When there is a shortage of labor, even the worst discriminator will fill an essential job with a minority or woman rather than leave it vacant.^{18/} On the other hand, job scarcity often breeds discrimination and heightens the need for EEO

^{17/} See, e.g., J. Polito, "Paperless Office", PC/Computing, December 1, 1998, at 256.

^{18/} That is why minority and female employment in managerial and technical jobs invariably accelerates during wartime.

compliance efforts. The tightening job market in broadcasting has impacted programming positions the most, reducing substantially the number of jobs for tape editors, producers, and announcers. For example, radio broadcasters are substituting original local programming with computerized, pre-programmed material made to sound as though it is local.

Furthermore, the Telecommunications Act^{19/} has fostered more local and national ownership concentration.^{20/} Radio superduopolies and TV and radio local marketing agreements ("LMAs") have meant fewer jobs overall. As stations reduce their workforces to capitalize on the economies of scale flowing from ownership concentration, job opportunities in broadcasting have grown more scarce. In 1995, before the Telecommunications Act was passed, there were 153,058 people employed in broadcasting; in 1997, there were 149,974.^{21/}

Consolidation often shifts positions from local stations to centralized headquarters operations, where an individual can perform functions for several stations simultaneously. Headquarters operations were exempt from the FCC's original EEO Rule. As MMTC demonstrated in its 1996 study of baseline EEO data, headquarters

^{19/} 47 U.S.C. §§202(a), 202(b)(1) (1996) (multiple ownership).

^{20/} See generally K. Ofori, K. Edwards, V. Thomas and J. Flateau, Blackout? Media Ownership Concentration and the Future of Black Radio: Impacts of the Telecommunications Act of 1996 (1997) ("Ofori").

^{21/} FCC, EEO Trend Reports (1996 and 1997). See A. DeBarros, "Radio's Historic Change: Amid Consolidation, Fear of Less Diversity, Choice", USA Today, July 8, 1998, at 1A-2A ("DeBarros") (explaining how huge broadcast companies "can combine operations, reach wider audiences and use technology to share content and cut costs.")

operations tended to employ relatively fewer minorities and women than did broadcast stations. See p. 50 infra.

Moreover, job consolidators often convert fulltime jobs into parttime jobs. This made stations appear smaller on Form 395, garnering exemptions under the original EEO Rule's station size cap.

Our purpose is not to criticize job consolidation, but to highlight the fact that job consolidation is occurring at a time when the industry has yet to achieve equal employment opportunity. Intense pressure is being placed on the job security of the "last hired" -- who frequently are minorities and women.^{22/}

In a tight job market, minorities and women seldom find themselves in a position to assert their civil rights or challenge discriminatory behavior. In a close-knit industry such as broadcasting, there is always intense pressure on discrimination victims not to sue because they can be branded as troublemakers and blackballed. This pressure is especially intense during periods of job consolidation. Discriminatory demotions are seldom challenged before the EEOC because such challenges place the demoted individual at risk of losing her job. In our experience, minorities and women facing a choice between years of litigation

22/ In Glass Ceiling: The Environmental Scan, Glass Ceiling Commission (1995) ("Glass Ceiling/Environmental Scan"), at 17, the Federal Glass Ceiling Commission ("FGCC") reported its research on recent changes in the organization of work. The research demonstrated that "downsizing and restructuring can limit opportunities for all managers, professionals, and administrators" through, inter alia, "elimination of layers of management and staff positions"; "hiring of independent contractors or small businesses to perform some staff functions." The FGCC noted that "[r]estructuring can present problems as well as opportunities for minorities and women in management" because "[i]n some cases the last hired are the first fired."

coupled with being unemployed, or a suboptimal job, will almost always choose the job -- the only option that delivers some income.

Further exacerbating job pressure on minorities and women is the decline in the number of media employers in the wake of the Telecommunications Act.^{23/} While a terminated employee in a large market formerly could seek employment with ten or twenty other station owners, today's terminated employee may realistically have only two or three places to go. An employee may feel -- with some justification -- that if she is perceived as a troublemaker by invoking her civil rights, the small club of local broadcast licensees could easily lock her out, forcing her to choose another career or to leave town.

Consolidation has also triggered a steep decline in minority ownership.^{24/} Minority owners demonstrably tend to hire more minorities than other owners across all job categories, even controlling for market size and format.^{25/} However, as a consequence of the loss of the tax certificate policy and the growth of local superduopolies, minority owners are being forced

^{23/} See BIA, State of the Radio Industry (1998) (finding that before the Telecommunications Act, 5,222 owners controlled some 10,250 stations, while two years later, 4,499 owners -- a decline of 723 owners -- operate some 10,500 stations.)

^{24/} EEO and minority ownership are complementary goals. Just as the availability of minority owners promotes minority employment opportunity, EEO enforcement is needed to help restore the growth in minority ownership. See discussion at 167-74 infra.

^{25/} See p. 170 n. 299 infra (discussing research on the nexus between minority ownership and employment).

out of the industry at warp speed.^{26/} Few new ones are gaining a foothold.

3. **Regulatory conditions are impeding minority and female entry into and participation in broadcasting**

Although EEO enforcement has ground to a halt in the wake of Lutheran Church, some broadcasters have voluntarily continued some of their efforts to recruit minorities and women. Others, however, have terminated these efforts. With no public accountability at all, discriminators are now free to indulge their prejudices.^{27/} We even lack EEO data to track, on an industry-wide basis, the impact of this period with no enforcement. With no renewals due until 2003, we face four years with little EEO scrutiny of the broadcasting industry.

^{26/} See DeBarros at 2A (analyzing Commerce Department data, USA Today reports that minority owned AM and FM stations dropped 9%, from 312 to 284, from 1995 to 1997.) The difficulties facing the surviving minority owners are well documented. See C. Jones, "Owning the Airwaves", Essence (October, 1998) at 113 (describing the survival of Radio One, the largest remaining Black owned radio group); B. McConnell, "Few and far between," Broadcasting and Cable, October 5, 1998, at 28 (discussing the FCC's difficulties in continuing to promote minority ownership). In a recent editorial, Electronic Media predicted that "[w]hat may happen to minority-owned media companies is what may happen to all of those smaller, out-of-the-mainstream voices in the new age of consolidation. As the big get bigger, the smallest get lost." "Embracing diversity," [editorial], Electronic Media, August 21, 1995.

^{27/} The popular media has done little to report fully on the threat to diversity posed by Lutheran Church. On the other hand, misconceptions about the case have been allowed to fester. For example, the respected magazine Hispanic Business recently published a letter erroneously stating that after Lutheran Church, "advertisements promoting outreach, recruitment, and training programs for minorities and females...are now illegal, even if racial or gender preferences are not used during the actual employment process." F. Reimann, "Affirmative Action Programs Illegal" [Letters], Hispanic Business, November, 1998, at 12.

The EEOC retains jurisdiction over the extremely rare case in which an employer has been so careless that an individual employee or job applicant learns that she has been subjected to intentional discrimination, and the individual is among the very few with the financial resources and a willingness to risk their careers for the several years it takes to prosecute the typical Title VII case. However, the EEOC's enforcement abilities are a shadow of what they were a generation ago. The EEOC has still not recovered from budget cutbacks during the 1980's; many EEOC offices have a lengthy backlog of cases, and the EEOC can no longer investigate most cases. The agency is demoralized and grossly underfunded. It is simply unable to play a meaningful role in promoting equal opportunity in broadcasting.^{28/}

**4. Social forces are impeding
minority and female entry into
and participation in broadcasting**

An agency cannot impose EEO regulations to compensate for societal discrimination. However, an agency ought not to blind itself to the terrain through which it is travelling as it decides on the direction and emphasis of its civil rights programs. In broadcasting, several factors should be considered, as shown below.

^{28/} See "EEOC Boosts Enforcement, But Gaps Prevent Fully Effective Program, Researcher Finds," Fair Employment Report, February 24, 1999, at 27 (reporting on an upcoming book by Nancy Kreiter for the Citizens Commission on Civil Rights, which found that the EEOC's 1998 settlement rate was about 8%, compared to 32% in 1980, and its 1988 no-cause finding rate was 61%, compared to 28.5% in 1980.) For a discussion of the interplay between the EEOC's and FCC's jurisdiction in this area, see pp. 94-96 infra.

a. **Bigotry and intolerance have
spread at an alarming rate**

Observers of popular culture often point to the integration of MTV -- beginning with its 1982 decision to include Michael Jackson's videos in its schedule -- as the moment which did the most to break down racial prejudices among White teenagers. Thus, it is disturbing to see reports of a recent dramatic increase in race prejudice by high schools students. Between 1997 and 1998, teens reporting themselves prejudiced against African Americans and Hispanics each increased from 8% to 15%.^{29/} This is the generation older Americans had hoped would carry the torch for voluntary efforts to desegregate American business.

A climate of racism continues to poison the land, emboldening those who would deny equal opportunity in the absence of strict federal oversight.^{30/} The resurgence of racism is most visibly

^{29/} Who's Who in America, Who's Who Among American High School Students, 29th Annual Survey, November, 1998.

^{30/} The President's 1995 affirmative action review found that "the evidence is overwhelming that the problems affirmative action seeks to address -- widespread discrimination and exclusion and their ripple effects -- continue to exist." Office of the President, "Review of Federal Affirmative Action Programs," July 19, 1995, at 20 ("Affirmative Action Review"). Deval Patrick, then Assistant Attorney General for Civil Rights, explained that

regrettably, discrimination on the basis of race, ethnicity and gender persists in this country: not just the effects of past discrimination, but current, real-life, pernicious discrimination of the here and now. Last year, for example, the Equal Employment Opportunity Commission received over 91,000 complaints of discrimination in employment alone. In the Civil Rights Division, we filed record numbers of cases last year and opened thousands of investigations, but we cannot keep up.

apparent in the resurgence of racial hate crimes, including the burnings of dozens of Black churches. The most passionate struggles of the civil rights movement are no longer alive in the memory of most Americans, and the lessons of those struggles are often now lost on the body politic.^{31/} For many of today's young people, the civil rights movement is American history.

Even facially sincere initiatives to promote inclusion often rest on the weakest foundations, threatening the initiatives' long-term survival. This point was brought home recently when the Washington Post reported on the release of more than 100 hours of

30/ [continued from p. 14]

I believe that if any of you could sit at my desk, as Assistant Attorney General for Civil Rights, for a week, you would be astonished and saddened by the incidents of unfairness, discrimination, or even violence motivated by race, ethnicity or gender (to say nothing of disability) that still block access for far too many individuals to the bounty of opportunity that America has to offer.

Testimony of Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, Before the Subcommittee on Employer-Employee Relations, Committee on Economic and Educational Opportunities, United States House of Representatives, March 24, 1995, at 2.

31/ According to The Race Relations Reporter, "[a] poll by the National Opinion Research Center at the University of Chicago has determined that deep-seated racism is still widespread in the United States, most notably in southern states." The survey found that 19% of all southerners admitted that they believe Blacks are less intelligent than Whites; more than one quarter of White southerners openly expressed the belief that there should be laws against interracial marriage; and 44% of all southerners believe that they should have the legal right to refuse to sell their house to a person because of the prospective buyer's race. The Race Relations Reporter, August 15, 1996, at 1. In the November, 1998 elections, 326,000 South Carolinians -- 38% of the total electorate -- voted to retain a ban on interracial marriages in the state constitution. The Race Relations Reporter, February 15, 1999, at 1. See also p. 140-41 n. 247 *infra* (providing current Gallup Poll findings on the level of prejudice).

Nixon White House tapes, including Nixon's conversations about putting women and minorities in government positions:

A memo composed by [Nixon aide] Fred Malek...suggested that the president not only wanted to put the "highest priority on competence and philosophical compatibility" in selecting political appointees, but also was optimistic about recruiting minority candidates for full-time positions.

"Blacks have highest priority, followed by Mexican-Americans, and then by ethnics," Malek wrote. "Competent women who can compete with men should be placed in selected positions, especially in those with symbolic value."

The tape showed what Nixon really thought. After saying he doubted women were "worth the effort," he voiced his skepticism about black appointees in even harsher terms.

"With blacks," the president said, "you can usually settle for an incompetent, because there are just not enough competent ones, and so you put incompetents in and get along with them, because the symbolism is vitally important. You have to show you care."

Later, after expressing his low expectations for Mexicans, Nixon added: "That's the problem, finding a Mexican that is honest. And Italians have somewhat the same problem."

G. Lardner, Jr., "On Tapes, Nixon Sounds Off", Washington Post, December 27, 1998, P. A-1 (reporting on a Nixon-Malek conversation in the Oval Office on March 8, 1971).

The full scope of race prejudice in society today is perhaps best revealed by experiments conducted on a variety of industries between 1989 and 1993 by the Lawyers Committee for Civil Rights and by the NAACP. These experiments involved pairs of "testers", each applying for the same jobs on the same days. The studies found that about 20% of employers discriminate at the point of entry into

the employment process when they think nobody is looking.^{32/} That evidence is consistent with the perceptions and experiences of American workers,^{33/} and with the conclusions of the Federal Glass Ceiling Commission.^{34/}

Broadcasting has not been immune to these social trends -- indeed, it has done much both to cause and fail to prevent these trends. In the 1970's, the leading national broadcast personalities -- Harry Reasoner, Charles Kuralt, Walter Cronkite -- stood up for tolerance and understanding. Today, the industry

^{32/} See Affirmative Action Review, at 20-21; B. Reskin, The Realities of Affirmative Action in Employment (1998) at 27. Major corporations found guilty of discrimination in the 1990's include Texaco, Circuit City, British Petroleum, Burlington Industries, Canon, Honeywell, Kimberley Clark, Lucky Stores, Marriott, Merrill-Lynch, and Shoney's. Id. at 26.

^{33/} According to a study by the National Law Journal, "[m]ost Americans believe employers discriminate in hiring and promoting workers...While the vast majority of those reporting job discrimination did not take formal action, many now say they are more likely to seek legal redress. Seventy-eight percent of adult Americans believe some, more or all employers practice some form of discrimination in their hiring or promotion practices," despite official equal opportunity policies. Fifty-one percent specified that 'all or most' employers are guilty of discriminatory practices, while 25 percent said they have been discriminated against on the job." National Law Journal, July 16, 1990, at 1.

^{34/} The Federal Glass Ceiling Commission concluded that "prejudice against minorities and white women continues to be the single most important barrier to their advancement into the executive ranks." Glass Ceiling/Environmental Scan, at 6. Even very senior minority managers are not immune from discrimination in the workplace. See Korn/Ferry International and Columbia Business School, "Diversity in the Executive Suite: Creating Successful Career Paths and Strategies" (1998) at 34, which reported the results of a study of 280 minority senior executives at the nation's leading service, industrial and financial institutions, each earning over \$100,000 per year, and 26% earning over \$400,000 per year. While 93% were satisfied with their careers, 59% had observed double standards in delegation of assignments, and 40% had experienced being denied promotion and suspected it was because of racial or cultural background, and 21% noticed that the office staff support system tended to give their work lower priority in comparison with White counterparts.

enables outright bigots to become talk show hosts (e.g. Bob Grant, Mark Furhmann), and also boasts other, more genteel personalities (e.g. Rush Limbaugh, Gordon Liddy). Intolerance has become the national signature of the radio industry.^{35/}

Nothing inherent in the history, culture or structure of the broadcasting industry renders that industry either more or less racist than the society it mirrors. It follows that if discrimination should disqualify a licensee from renewal, the Commission has erroneously granted approximately 20% of the license renewal applications it processes. Even if broadcasters were ten times more ethical than other employers, discrimination would be a factor at scores of stations.

**b. Discriminators have become
far more sophisticated in
concealing their intentions**

By the middle 1970s, the D.C. Circuit realized that since the 1960's, discrimination had been transformed into "a subtle process which leaves little evidence in its wake." Bilingual Bicultural Coalition on the Mass Media v. FCC, 492 F.2d 656, 659 (D.C. Cir.

^{35/} See K. Stern, "Hate on Talk Radio", USA Today Magazine, July, 1992, at 58-61 ("[r]adio gives hate-mongers a platform and grants them a measure of legitimacy...most talk-radio personalities today are male, conservative, and white....There is a concerted efforts by some right-wing hate groups to use the airwaves to spread their message....Their ideas, no matter how bizarre, gain a measure of normalcy if the presenter is poised and polished.")

1974) ("Bilingual I").^{36/} Over the past generation, discriminators in broadcasting have become even more sophisticated in concealing their intentions. The Commission will never again be faced with a licensee inept enough to state, in its renewal application, that it will recruit minorities for "suitable" positions when "feasible",^{37/} or one brazen enough to ask a job counselor "don't you have any white girls to send me? This one would make charcoal look white",^{38/} or one which virtually admits discrimination in response to a petition to deny.^{39/} Today, virtually every

^{36/} As expressed more recently by Judge Posner in Riordan v. Kempiners, 831 F.2d 690, 697-98 (7th Cir. 1987):

Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it....A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries. That is why the availability of evidence to test for possible discrimination is critical.

^{37/} Rust Communications Group, Inc. (HDO), 53 FCC2d 355, 363 (1975) (subsequent history omitted) ("Rust/HDO").

^{38/} Catoctin Broadcasting of New York, Inc. (HDO), 4 FCC Rcd 2553, 2554-55 ¶¶15-16 (1989) (subsequent history omitted) ("Catoctin/HDO").

^{39/} See, e.g., Lutheran Church/Missouri Synod (HDO), 9 FCC Rcd 914 (1994) (subsequent history omitted) (vacated in The Lutheran Church/Missouri Synod (Order), 13 FCC Rcd 23328 (1998) and (Erratum), December 3, 1998)), in which a renewal applicant opposed a petition to deny by stating that it had not recruited minorities because -- in the licensee's opinion -- minorities did not listen to classical music and therefore lacked the "expertise" to work at the station. It later emerged that White employees were not required to possess, and routinely lacked any such "expertise" or listenership. In a miscarriage of justice, the FCC renewed the licenses anyway, and although no Whites had complained of discrimination against them by broadcasters in 30 years, a court found that the EEO Rule actually unlawfully "pressured" broadcasters to hire minorities. Lutheran Church, supra. We are confident that historians will be quite severe in their judgment of this bleak chapter in broadcasting history.

discrimination-minded broadcaster with marginally competent FCC counsel can avoid any scrutiny at all by simply filing its EEO program every eighth year with the right boxes checked, and with reference to a few well known organizations as recruitment sources (being careful only to identify very large organizations, who could never verify whether they actually ever received job notices), and otherwise volunteering as little information as possible. In this cynical way, hundreds of discriminators annually slip below the FCC's and civil rights organizations' radar screens.

Consequently, it should come as no surprise that after two generations of television, there is still no lead female anchor of a national network weeknight newscast.^{40/} It is unlikely that any network executive today would tell a female correspondent "out loud and without hesitation, 'we don't hire women to do that. We will not hire women'", as Cokie Roberts was told in 1964.^{41/} Yet in 1997, no woman was among the ten most visible correspondents on the

^{40/} In January, a jury awarded Hartford TV anchor Janet Peckinpugh \$8.3 million in her age and gender discrimination case. The company's defense was that pairing anchors of opposite sexes was an industry practice. D. Trigoboff, "Ex-anchor wins \$8.3M bias suit," Broadcasting & Cable, February 1, 1998, at 13. Thus, the employer has admitted a dirty secret in the business: gender drives employment decisions for on-air positions. Ironically, the employer, Post-Newsweek Stations, has long been among the industry's most sincere and progressive companies in equal employment compliance.

^{41/} Junior Bridge, "Diversity, Multiculturalism & the Media," Quill, July/August, 1995, at 16-17. Nor would a television station be so brazen as to hire no women in the newsroom until faced with a license coming up for renewal -- as Jane Pauley experienced early in her career. Ms. Pauley gave "praise...to the FCC because I got my job at WISH-TV in Indianapolis because they had to find a woman. It was FCC license renewal time, and there were no women in the newsroom." Id.

ABC, CBS and NBC nightly newscasts.^{42/} According to the deposition testimony of a major market TV station anchor, a Houston TV station was recruiting him because it was "looking for white males" so it could "pair them up with a female....In TV, you are cast in these big piles - blondes, or whatever. We are pieces of furniture."^{43/}

Race, too, remains a significant factor in determining employment opportunities in broadcast journalism: as one veteran Minneapolis TV reporter concluded, "broadcasting is the last industry in America that can legally discriminate."^{44/}

^{42/} P. Albinia, "Gender gap on nightly beats," Broadcasting & Cable, February 9, 1999, at 32.

^{43/} M. Allen, "Discrimination Suit Protests the brief Shelf Life of a TV Anchorwoman," New York Times, January 24, 1999, at 31 (quoting the testimony of Dennis House, WFSB-TV, Hartford, CT anchor and reporter).

Age is also a significant factor in on-air scheduling, particularly for women. Veteran Washington, D.C. television anchor Maureen Bunyan, returning to local news anchor slot after a three year absence, stated that "Women are supposed to lose their value as they age. This standard exists in many fields; it's not unique to television, it's just extremely visible in television." L. de Moraes, "Maureen Bunyan Returns: Details at 11", Washington Post, February 2, 1999, at C1, C7 ("de Moraes").

^{44/} Lamber, quoting Lou Harvin, a KCTA-TV reporter with 21 years of experience in the Twin Cities. Harvin added:

Black people know what's going on. They know if there's a job opening for an engineer at some station that if that station's already got an engineer who's black there's no point wasting their time even going over there. They've got their black. And the same thing applies to reporters and anchors....

As difficult as it's been for reporters here, a question worth asking is whether any station would dare have a black man in the traditional position of authority over a white woman....

On-air assignments are only the most visible example of discrimination. Advertising agencies draw staff and leadership from the same pools as broadcast sales departments. Thus, it is highly significant that advertising industry practices, including racial stereotyping, result in such practices as "no Urban/Spanish dictates" and "minority discounts", driving down the revenues of minority stations.^{45/} Thus, it is unsurprising that minorities

44/ [continued from p. 21]

The new in-thing is light-skinned ethnic people who could almost pass for white. They're a safer hire. They're light enough not to irritate anyone. They draw less attention to their color.

KMSP-TV, Minneapolis anchorwoman Robyne Robinson agreed that:

I know there's a non-threatening factor to me. It's a visual thing. People have a certain perception of who black women should look and act on the air, and the belief is that viewers are more at ease with black women who look like a white woman dipped in chocolate. You know, no big lips, no big nose, no kinky hair. And yeah, I know I fit that bill to some extent. Also, I'm in a more deferential position, being the woman of the anchor team. That makes a difference.

45/ Civil Rights Forum on Communications Policy, "When Being No. 1 Is Not Enough: The Impact of Advertising Practices on Minority-Owned & Minority-Formatted Broadcast Stations", January, 1999 ("Civil Rights Forum"). A recent lead article in the Wall Street Journal explained how many Black owned companies, in order to avoid losses in sales due to customer prejudices, are reluctantly forced to conceal their racial identities when operating in the suburbs. A. Henderson, "Color Code: Black Entrepreneurs Face a Perplexing Issue: How to Pitch to Whites; Some Prefer a Low Profile, often Using Stand-Ins for Suburban Campaigns; Choosing a Caucasian Clone", Wall Street Journal, January 26, 1999, at A1. The advertising industry is exceptionally exclusionary: according to the Bureau of Labor Statistics, in 1996 only 2.9% of advertising managers were Black and 2.8% were Hispanic. N. Weber, "Diversity in the Advertising Industry," The Diversity Factor (Fall, 1997) ("Weber"), at 43.

continue to find broadcast sales jobs among the most difficult to secure.^{46/}

The growing sophistication of discriminators cries out for a much stronger and more intensive FCC enforcement role. It is a seminal principle of law enforcement that when lawbreakers grow more sophisticated in concealing their misconduct, the constable must redouble his enforcement activity. That is why reliance only individual complaints to apprise the FCC of discriminatory policies is a prescription for failure. It would be a serious mistake for the FCC to rely exclusively on the rare and very brave individual who is willing to endure several years of time and expense of prosecution for little or no personal gain -- and who also is fortunate to have had an employer sloppy enough to reveal his racist intentions.^{47/}

^{46/} See p. 47, Table 2.

^{47/} See John D. Donohue and Peter Siegelman, "The Changing Nature of Employment Discrimination Litigation," 43 Stanford L. Rev. 983, 1005, 1031 (1991) (most discrimination victims do not file complaints either because they do not know that discrimination had cost them a job or a promotion, or because they are too vulnerable to sue). Sophisticated employers are especially careful to conceal discrimination, retaliate against "troublemakers" or outspend or outlast them before the EEOC or in court. Thus, it is unsurprising that throughout the history of the EEO Rule, there has only been one case in which a final court order holding that a broadcaster discriminated was ever again before the Commission for review. The station involved had been sold four times in the 16 years it took to get that final court order. Unsurprisingly, the Commission didn't unscramble four sales to get at the original discriminator.

[n. 47 continued on p. 24]

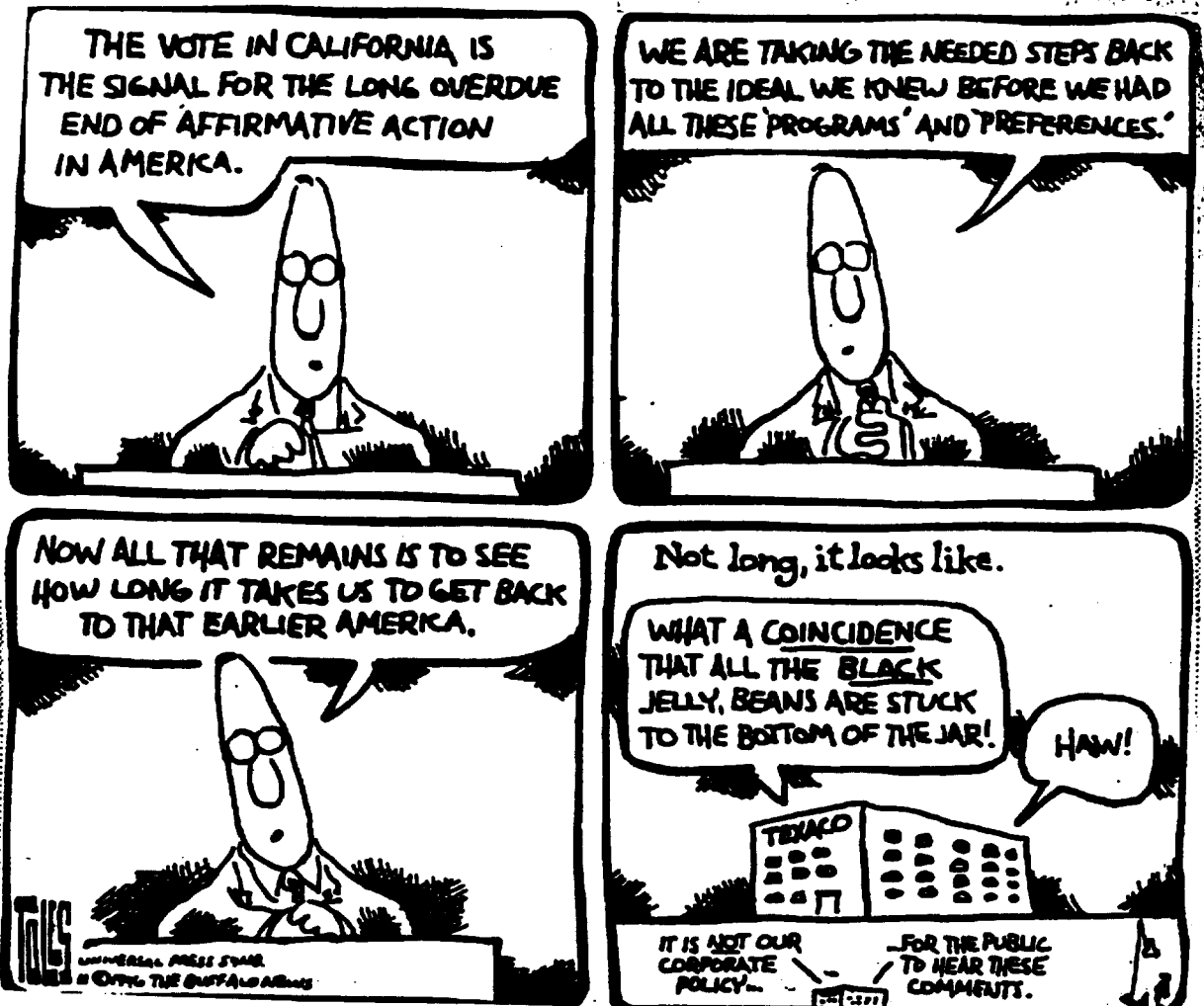
c. Educational opportunities for minorities are imperiled by court decisions and by the "digital divide"

Securing broadcast employment requires both skills and opportunity. Many broadcasting jobs are filled by inexperienced people who are given a chance to learn on the job. Typically, these have been privileged individuals, such as relatives of station owners, managers, or advertisers. Minorities seldom secure these perks, and therefore have had to meet "merit-based" educational requirements to get their feet in the door.

Yet as discussed below, two trends deeply affecting secondary and college educational environments threaten to reduce the number of minorities possessing these entry-level "merit-based" skills. Consequently, broadcasters will need to be encouraged to include minorities among those who are given the opportunity to learn broadcasting on the job.

47/ [continued from p. 23]

It's important to remember that some very egregious discrimination happens to those who don't know it while it's happening to them, and the discriminator may not be conscious of it either. As these Comments were being completed we learned of a shocking study documenting the full extent of unconscious discrimination by primary care physicians. As members of a helping profession, physicians are hardly thought to be discriminators. But they are -- with life or death consequences. A study of how 720 primary care physicians would treat patients with identical complaints of chest pain -- tightly controlled so that the race and sex of the patients were the only independent variables -- found that Blacks and women would have been referred to heart specialists for cardiac catheterization tests only 60% as often as would White male patients, with Black women referred for the test only 40% as often as White men. A. Goldstein, "GU Study Finds Disparity In Heart Care," Washington Post, February 25, 1999, at A1 (reporting on study by Georgetown University, just published in The New England Journal of Medicine.) After reviewing the study, U.S. Surgeon General David Satcher pointed out that "Blacks are 40 percent more likely [than Whites] to die from heart disease, and this could be one factor." Id. at A1, A13.



The most immediate threat to minority advancement takes the form of a new wave of anti-affirmative action court decisions and ballot initiatives affecting higher education^{48/} and even

^{48/} California Proposition 209, approved in 1996, and Washington State Initiative 200, approved in 1998, bar consideration of race and gender in state employment, contracting and education programs. Proposition 209 was upheld by the 9th Circuit and went into effect on August 28, 1997. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S.Ct. 2580 (1996) ("Hopwood") invalidated affirmative action admissions in public universities in the Fifth Circuit. The court applied strict scrutiny and held that diversity was not a compelling state interest for 14th Amendment equal protection purposes. See also Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992) (applying strict scrutiny and invalidating a state university's minority scholarship program); Taxman v. Piscataway Board of Education, 91 F.3d 1547 (3d Cir. 1996) (en banc) (applying Title VII and finding that racial diversity is an insufficient basis for employee termination.)